(18,637.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 409.

ROBERT L. WINEBRENNER, APPELLANT,

vs.

EDWARD C. FORNEY.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF OKLAHOMA.

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a In the Supreme Court of the United States.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.

The President of the United States to Edward C. Forney, Greeting:

You are hereby cited and admonished to be and appear at a session of the Supreme Court of the United States, to be held in the city of Washington on the sixteenth day of August, next, pursuant to an appeal filed in the office of the clerk of the supreme court of the Territory of Oklahoma, wherein Robert L. Winebrenner is appellant, and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant as in said appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties.

Witness, the Honorable John H. Burford, chief justice of the supreme court of Oklahoma Territory, this 18th day of July, 1902.

JNO. H. BURFORD,
Chief Justice of the Supreme Court of Oklahoma Territory.

Attest:
[Seal Supreme Court, Territory of Oklahoma.]
BENJ. F. HEGLER, *Clerk.*

I hereby accept service of the foregoing citation, this 25 day of July, A. D. 1902.

DALE & BIERER,
Attorney- for Edward C. Froney.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Citation. Filed Jul- 29 1902 Benj. F. Hegler, clerk supreme court, by —— ——, deputy.

1 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.
} Petition in Error.

Plaintiff in error complains of defendant in error and says that a certain action was heretofore pending in the district court of Kay county, Oklahoma Territory, wherein this plaintiff in error was plaintiff, and defendant in error was defendant, which said action was on the 7th day of October, 1901, finally terminated by a final order, judgment and decree of the said court dismissing the action of plaintiff in error against defendant in error and adjudging that this plaintiff in error pay the costs of said action; that there is error in said proceeding and judgment in this:

I.

That the court erred in sustaining the demurrer of defendant in error to the amended petition of plaintiff in error.

II.

That said court erred in sustaining the demurrer of defendant in error to the second amended petition of plaintiff in error.

III.

That said court erred in dismissing said cause at the cost of plaintiff in error, and rendering judgment against plaintiff in error.

Wherefore plaintiff in error prays that said erroneous judgment, order and decree be set aside and held for naught; that he be restored to all things which he has lost by reason thereof and for costs of this proceeding in error.

S. H. HARRIS,
Attorney for Plaintiff in Error.

2 Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

In the District Court of Noble County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant.
} Case-made.

Be it remembered, that heretofore, to wit, on the 26th day of September, A. D. 1900, the said plaintiff, Robert L. Winebrenner, commenced his action against said defendant, by filing in the district court of Kay county, his petition, which is in words and figures following to wit:

In the District Court in and for Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant.
} No. —.

Petition.

Plaintiff complains of said defendant and says: that he is a natural-born citizen of the United States and on the 16" day of September, 1893, was over the age of twenty-one years and was then the head of a family; that prior to the opening of the Cherokee Outlet to settlement on September 16", 1893, plaintiff had never entered upon
3 or occupied any of said lands, embraced in the lands known as Cherokee lands, was not then and is not now the owner of the one hundred and sixty (160) acres of land and prior to the opening of said Outlet to settlement, plaintiff procured a booth certificate, under the rules and regulations prescribed by the Honorable Secretary of the Interior and at the time of the opening of said country to settlement, ever since said time and at the present time, plaintiff was and is in all respects qualified under the laws of the United

States to take hold and acquire title to lands opened for homestead and settlement as aforesaid.

That on the 22nd day of September, 1893, this plaintiff settled upon and occupied the southwest quarter (S. W. ¼) of section nineteen (19) in township twenty-six (26) north of range one (1) east of the Indian meridian being a portion of the lands opened to settlement in said Outlet on the said 16th day of September, 1893; that the plaintiff then and there set his stake on said land, with his name inscribed thereon and immediately commenced digging a well on said premises; that said settlement was made with the intention, on the part of this plaintiff and for the purpose of acquiring the same as a homestead, by virtue of the laws of the United States; that plaintiff has ever since continued to occupy and reside on said premises, and to cultivate and improve the same in compliance with the homestead laws.

That shortly after said settlement, plaintiff placed a wire fence entirely around said premises and commenced to cultivate and improve, for the purpose aforesaid; that shortly after said settlement and during the spring and summer of 1894, this plaintiff dug a good well on said premises and put about sixty (60) acres *out* cultivation and also built two houses on said premises and made other lasting improvements thereon, all of the value of about two hundred ($200.00) dollars, not included in said valuation, the cost of breaking and cultivating said land.

Plaintiff further says, that on the 23" day of September, 1893 the defendant disregarded the rights of this plaintiff as prior set-
4 tler on and occupant of said lands, made a homestead entry thereon at the United States land office at Perry, Oklahoma; that shortly after the making of homestead entry, said defendant forcibly *through* down and distroyed a portion of plaintiff's fence placed around said premises as aforesaid and plaintiff was by the forcible act of the defendant reduced to the possession of only about ninety (90) acres of said land and defendant has occupied the remainder of said land since some time during the year 1894 until the present time.

Plaintiff further says that within three months after the date of his settlement upon said premises he filed in the said land office an affidavit of contest on the said homestead entry of said defendant alleging in substance, that he was the prior settler upon said lands and that the defendant was not qualified to make a homestead entry, for the reason that he had entered upon the country known as the Cherokee Outlet prior to 12 o'clock, central standard time of September 16 A. D. 1893 and that hour of opening said country to settlement, was made the outer boundaries known as Cherokee Outlet and make the one *one* hundred (100) feet reservation around and immediately within said other boundaries, and at the time said country was opened to settlement, defendant was on or near the western boundaries of that portion of said Cherokee Outlet, known as the Ponca Indian reservation; that said contest came on for hearing in said land office, on the — day of ——, 189– and then and there proceeded to trial and afterwards on the — day of —— 189– said cause was decided by the honorable register and receiver of

said land office in favor of said plaintiff. A true copy of said decision is hereto attached under mark of Exhibit "A" and made a part of this petition.

That thereafter in due time and form the defendant herein *applied* from said office and decision to the honorable Commissioner of the General Land Office and afterwards and on the — day of ——, 189–, the said Commissioner of the General Land Office rendered his decision in said case in favor of this plaintiff; that the said defendant in due time and form appealed from said decision to
5 the honorable Secretary of the Interior and thereafter on the — day of —— 1897 the said Secretary rendered his decision in said case in favor of the defendant herein and reversing the decision of the honorable Commissioner.

A true copy of said decision of said Secretary is hereto attached under mark of Exhibit "B" and made a part of this petition; that thereafter in due time and form this plaintiff filed his motion for — from said decision of the Secretary of the Interior, got on the 11" day of August, 1897 and the honorable Secretary of the Interior rendered his decision upon said motion denying the same and affirming the former decision in said case. A copy of said decision is hereto attached under mark*ed* of Exhibit "C" and made a part of this petition.

Plaintiff further states that at trial of the said commissioners of the United States land — at Perry, Oklahoma it was proven conclusive- and the register and receiver found the facts to be, that the defendant herein entered upon the country known as the Cherokee Outlet *and* hereby set forth and charged and also heard the decision; that said defendant was disqualified by reason of said unlawful entry to acquire said land as a homestead; that the honorable Commissioner of the General Land Office upon appeal of said decision found and determined as matter of fact that the defendant herein had entered upon the said Cherokee Outlet as herein charged and also found and determined that by reason of unlawful entry, said defendant was disqualified to acquire said lands as a homestead; that upon appeal of said case to the honorable Secretary of the Interior and upon the hearing and determination of plaintiff's motion for review, the said Secretary found and determined as a matter of fact, that said defendant had entered upon the country known as Cherokee Outlet and herein charged by the Secretary then and there misunderstood and missupplying the law with reference to the qualifications of the defendant herein, erroneously and unlawfully held and decided, that said defendant was not disqualified to acquire title to said land under the homestead law of the United States by reason of said unlawful entry upon lands aforesaid.

6 Plaintiff further says; that in all of said decision it was found and determined that this plaintiff had more and better rights to said lands over and above the present right, then the defendant herein and but for the erroneous and unlawful decision of the honorable Secretary of the Interior said land *was* by the Land

Department of the United States would have been *re*warded to this plaintiff.

Plaintiff further says, that he has resided upon said lands, cultivated and improved the same in all respects in compliance with the laws of the United States for more than five years and during said time and does at this time claim the same as his homestead under and by virtue of the laws of the United States.

Plaintiff further says that on or about the 31st day of July A. D. 1900 defendant herein made final proof of his residence upon, and claims said land and filed the same in the local land office at Perry, Oklahoma as required by law; that he then and there paid the fees of the register and receiver and received his final receipt; that on the — day of ——, 1900, said defendant received from the Government of the United States its patent conveying to him the full title to the land in question; that said final proof was accepted and said receipt issued and said patent issued and delivered to said defendant in violation of the rights and claim of this plaintiff in and to said lands and said patent, and apparent title of the said defendant is wholly void, by reason of the facts aforesaid; that said defendant still holds and claims said premises under said void patent and claims all ownership.

Wherefore plaintiff prays that the said apparent title and ownership of defendant be decreed to be a trust for the benefit of this plaintiff; that plaintiff be decreed to be the absolute owner of the legal and equitable title in and to said premises and that defendant be required to convey the same to this plaintiff and if defendant fails or refuses to make such conveyance, then that the decree of this court stand by such conveyance for other proper and equitable relief including the costs of this action.

S. H. HARRIS,
Attorney for Plaintiff.

7 EXHIBIT "C."

DEPARTMENT OF THE INTERIOR.
WASHINGTON, *January 18th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

The Commissioner of the General Land Office.

DEAR SIR: On September 23rd, 1893, Edward C. Forney made homestead entry for the S. W. ¼ of sec. 19, tp. 26, N. R. 1 E., I. M. Perry, Oklahoma. On October 7th, 1893, Robert L. Winebrenner filed a contest against the entry of Forney, alleging that Forney was disqualified because he entered the race from the Ponca reservation. Winebrenner also claimed prior settlement on said land. On November 3rd, 1893, John T. Smith also filed a contest alleging prior settlement and alleging that Forney was disqualified for the reason stated by Winebrenner.

The cases were consolidated and heard September 12th, 1894 On the day of the hearing Forney moved to strike from the contest affidavit the charge of disqualification, as it was insufficient upon which to order a hearing. The motion was sustained by the register on the authority of two letters of the Commissioner dated respectively October 3rd, 1893, in the case of McManus *vs.* Burns, and November 5th, 1894, in the case of Hartshorn *vs.* Young, which held that the law did not disqualify from entering from an Indian reservation.

On November 17th, 1894, the local office found that Forney was not disqualified by having entered the Territory from the Ponca reservation, and that neither Winebrenner nor Smith had made a valid settlement at the date of Forney's entry.

On July 6th, 1895, your office, speaking of Forney's disqualification said:

8 Your decision that Forney is a qualified entryman is in accordance with the ruling of this office in force at the time. That ruling has, however, been reversed by the Hon. Secretary. (Cagle *vs.* Mendenhall, 20 L. D. 46.)

"The testimony shows that Forney made the race from the Ponca reservation, and according to that decision, he is therefore disqualified from acquiring title to said land, and you- decision is reversed."

As between Smith and Winebrenner your office found that the latter had the superior rights. You then decreed that Forney's entry be held for cancellation and the land held subject to Winebrenner's right of entry. From this Forney and Smith both appealed.

On December 6th, 1896, the department overruled the decision in the case of Cagle *vs.* Mendenhall (20 L. D. 46), upon which your office decision is based, by ruling that entering from and Indian reservation did not disqualify a person to make a homestead entry.

Brady *vs.* Williams, 23 L. D.

In view of this and the failure on the part of contestants by preponderance of evidence to show prior settlement, your office decision is reversed, and the entry of Forney will remain intact.

The papers in the case are herewith returned.

Very respectfully, DAVIS R. FRANCIS, *Secretary.*

EXHIBIT.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 11th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

Motion for review.

Commissioner of the General Land Office.

9 SIR: The department on January 18th, 1897, rendered a decision in the case of Robert L. Winebrenner and John T.

Smith *vs.* Edward C. Forney, involving the S. W. ¼ of sec. 19, T. 26, N. R. 1 E., Perry land district, O. T. reversing the decision of your office dated July 6th, 1895, and holding that the defendant Forney was not disqualified from acquiring lands in Oklahoma by reason of having entered the Territory from the boundary of an adjacent Indian reservation. Winebrenner and Smith respectively have filed motions for review of said case. The allegations, (aggregating forty in number), accompanying said motion content primarily that the departmental decision upon which the case at bar was ruled (Brady, *et al. vs.* Williams, 23 L. D. 533), was erroneous and ought to be overruled. Said case of Brady, *et al. vs.* Williams was decided by the department on review, July 24th, 1897, and the doctrine therein enunciated reaffirmed.

It is now alleged that there is a distinction between the Brady-Williams case and the case now under consideration inasmuch as in the former case "Brady entered from the one-hundred-foot strip and not from the reservation."

This allegation is answered by the original departmental decision in the Brady-Williams case, (23 L. D. 533), and answered directly by the same case on review, (25 L. D.) which says: "It is argued that those entering from that side were transfressors because of having reached the strip through an Indian reservation; but the fact that one is a transgressor on an Indian reservation would not, of itself, disqualify him from making homestead entry. No such result is disclosed in the statutes and none such is found in any law or treaty."

The allegation last above referred to is found in the motion filed by counsel for Smith. On the contrary counsel for Winebrenner alleges that Forney was disqualified, notwithstanding the departmental decision in the case of Brady, *et al. vs.* Williams, for the reason that at twelve o'clock noon central standard time Sept. 16th, 1893, said Forney was upon and within the lands opened to settlement on said date, at a point immediately west of Ponca reservation.

Winebrenner's affidavit makes no such charge as above, but on the contrary alleges that said Forney, at twelve o'clock noon of September 16th, 1893, was in township 25, N. R. 1 E. of I. M., and entered the lands opened to settlement from the position in said T. 25 R. 1 E. I. M.

T. 25, N. R. 1 E. is in the Ponca Indian reservation. The contestant cannot, on motion for review, for the first time, set up a new charge—certainly not one inconsistent with the charge formerly made.

The remaining allegations in each of the motions for review relates to the question of priority of settlement regarding which nothing is offered that has not heretofore been presented to and considered by the department.

The motion and accompanying papers are herewith returned.

Very respectfully, THOS. RYAN,
Acting Sec'y.

On the back of which petition is endorsed the following:
"Filed Sept. 26–1900. Jay E. Pickard, clerk, by E. A. Burke, deputy."

And be it further remembered that thereafter to wit, on the 23rd day of October, A. D. 1900, the defendant, by his attorney, J. F. King, filed his motion in said cause, which said motion is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } No. 1645.

11 *Motion.*

Comes now the defendant in the above-entitled cause, and moves the court to require plaintiff to fill in the blank dates in his petition so as to show the dates on which the contest in the local land office was tried and the date on which the same was decided. That plaintiff be required to attach to his petition his alleged Exhibit A.

That plaintiff be required to fill in the blanks in his petition showing the date of the Hon. Commissioner's and the Hon. Secretary's decision of the contest set forth in plaintiff's petition.

That plaintiff be required to state wherein the Hon. Secretary misunderstood and misapplied the law as to the disqualification of the defendant.

That plaintiff be required to attach to his petition a copy of the decision of the Hon. Commissioner referred to in his petition.

That plaintiff be required to state before whom and in what land office the contest mentioned in his petition was tried and decided.

That plaintiff be required to state on what date patent for the land mentioned in his petition was issued to defendant.

That plaintiff be required to attach to his petition a true and correct copy of the decision of the Hon. Secretary and his decision on the motion for review mentioned in plaintiff's petition.

J. F. KING,
Attorney for Plaintiff.

On the back of which said motion appears the following filemarks:
"Filed Oct. 23, 1900 Jay E. Pickard, clerk, by E. A. Burke, deputy."

12 Be it further remembered that, to wit, on the 5th day of March, A. D. 1901, this cause coming on for hearing on the motion of defendant for plaintiff to make his petition more definite and certain, and the court being fully advised in the premises, the following entry was made, as the order of the court, on the journal, in words and figures as follows, to wit:

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } No. 1645.

Now on this 5th day of March, A. D. 1901, this cause comes on for hearing on motion of the defendant to require plaintiff to make his petition more definite and certain. Plaintiff appears by S. H. Harris, his attorney and defendant appears by J. F. King, his attorney;

Thereupon said motion is confessed by the plaintiff and the plaintiff asks leave of court for time to amend his petition.

Thereupon the plaintiff is granted leave to amend his petition herein on or before the 11th day of March, 1901.

(Journal No. 8, page 102.)

And be it further remembered that thereafter, to wit, on the 18th day of March, 1901, leave of court first being had and obtained, plaintiff filed his amended petition in said cause, which amended petition is in words and figures, as follows, to wit:

In District Court of Kay County, Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Amended Petition.

13 Now comes the plaintiff, by leave of court first had and obtained, and files this his amended petition and for cause of action against said defendant alleges and says:

That he is a native-born citizen of the United States of America; that on the 16th day of September, 1893, he was over twenty-one years of age and the head of a family; that prior to the opening of the country known as the "Cherokee Outlet," on September 16th 1893, this plaintiff had never entered upon or occupied any portion of the lands embraced in said "Outlet;" that plaintiff was not then and is not now the owner of one hundred and sixty acres of land in any State or Territory of the United States or anywhere else; that prior to the time of said "opening" plaintiff procured a booth certificate entitling him to enter a homestead in said Outlet, and at the time of the opening said country to settlement plaintiff was and at all times since has been qualified in all respects to take and hold land in said Outlet as a homestead, under the homestead laws of the United States and under the laws, rules and regulations relative to the opening of said country to settlement.

That on the 16th day of September 1893, at the hour of twelve o'clock, noon, central standard time, this plaintiff entered upon said country for the purpose of locating and claiming a homestead as aforesaid, and immediately thereafter entered upon and occupied the southwest quarter of section nineteen, in township twenty-six, north, range one, east of the Indian meridian, in Kay county, Territory of Oklahoma, being a portion of the lands opened to settlement as before described; that shortly after entering upon said land this plaintiff, beliving that said land had been lawfully occupied and

claimed by some other person, left the same, but returned thereto on the 22nd day of September, 1893, after being satisfied that said land was not lawfully occupied and claimed under the laws of the United States; that on said 22nd day of September this plaintiff occupied said land as a homestead under the laws governing the holding and acquiring of title to said lands and has ever since
14 held and claimed said land as a homestead; that plaintiff has ever since occupied said land and cultivated the same in accordance with the laws of the United States and is now fully entitled to a patent therefor by virtue of such compliance with the laws in relation to taking, holding and acquiring said land as a homestead.

That immediately after said settlement and occupancy of said land and as a part of the work performed thereon by this plaintiff pursuant to the homestead laws of the United States this plaintiff fenced said claim, dug a well thereon, put about sixty acres thereof in cultivation, built a residence thereon for himself and family wherein he has since resided.

Plaintiff further says that on the 23rd day of September, 1893 the defendant, disregarding the rights of this plaintiff as the first legal settler upon and occupant of said land, made a homestead entry for said land at the United States land office at Perry, O. T., the said land being located within the district for which said land office was located; that shortly after making said homestead entry the defendant threw down a portion of plaintiff's fence and took possession of about seventy acres of said land, and has ever since retained possession thereof to the damage of this plaintiff in the sum of $800.00.

Plaintiff further says that within three months after making settlement upon said land as aforesaid he filed a contest against the said homestead entry of defendant, in the said United States land office, alleging in substance that he settled upon and occupied said land before the settlement or homestead entry of defendant and that the said defendant was not qualified to make homestead entry of or settlement upon said land for the reason that he, the said defendant, entered upon and occupied the country known as the Cherokee Outlet prior to twelve o'clock noon, central standard time of the 16th day of September 1893 and subsequent to the act of Congress and proclamation of the President opening said lands to settlement and entry for homestead purposes and that at the hour of opening said country to settlement the said defendant was within the
15 outer boundary of said country and within the one-hundred-foot strip surrounding the said outer bound-ry and immediately within the said outer bound-ry and was then and there upon the western bound-ry of that part of said Outlet known as the Ponca Indian reservation; that a hearing and trial was ordered upon said contest and, on the 12th day of November, 1894 said contest came on for trial and was tried before the hon. register and receiver of the said land office at Perry, O. T., and upon said trial and consideration of the evidence offered on behalf of the respective parties, the said register and receiver rendered their decision in favor of the said defendant and against this plaintiff; that in due time and form

this plaintiff appealed from said decision to the Hon. Commissioner of the General Land Office and thereafter and on the 6th day of July, 1895, the said Commissioner reversed the said decision of the local office and found that this plaintiff was the first legal settler upon said land and that plaintiff was entitled to the land as a homestead by virtue of his compliance with the laws of the United States in that regard; that the said Commissioner also found and determined that the said defendant was within the outer boundaries of the said lands as hereinbefore set out and that as a matter of law he was thereby disqualified to acquire title to said land or to make a valid homestead entry thereon. That the local office had also found that the said defendant had entered upon said Outlet as herein set forth but erroneously determined that such fact did not disqualify him from taking, holding and acquiring title to said land, and the said decision of the Hon. Commissioner corrected said erroneous decision and conclusion of law.

A true copy of said decision of the Commissioner of the General Land Office is hereto attached, marked Exhibit "A" and made a part of this petition.

That the said defendant thereafter appealed from said decision of the Commissioner to the Hon. Secretary of the Interior; that upon consideration of said cause upon said appeal the said Secretary approved the findings of fact that the said defendant had entered upon the said Outlet as hereinbefore set out, but the said Secretary then and there misunderstood and misapplied the law in relation to the qualification of defendant to take and hold said land and on the 27th day of January, 1897 the said Secretary erroneously held, decided and determined that the said defendant was not disqualified on account of the facts aforesaid and held and determined that the said defendant settled upon and improved said land before the settlement and improvement of this plaintiff and filed his homestead entry thereon prior to the settlement and improvements of this plaintiff.

16

Plaintiff further says. that in all of said decision it was found and determined that this plaintiff was the prior settler upon said land but for the homestead entry and settlement of said defendant.

A true and exact copy of the decision of the said Secretary is hereto attached as Exhibit "B" and made a part hereof.

Plaintiff further says that in due time and form he filed his motion for a review of the said decision of the Secretary of the Interior urging the error of law aforesaid and afterwards and on the 11th day of August, 1897, the said Secretary rendered his decision upon said motion, and in said decision again erroneously and unlawfully held and determined that the facts herein set out and found by the various departments of the Land Department of the United States in reference to the entry of defendant upon the lands in question, did not disqualify the said defendant to take, hold and acquire title to said land under the laws of the United States; that this plaintiff, after having complied with all the laws of the United States and being found to have so complied with said laws, and after being fully entitled to a patent for said land was unlawfully and wrongfully

denied his rights in the premises and the homestead entry of th said defendant was held intact and said land awarded to him.

A true and exact copy of said decision of the Secretary upon the said motion for review is hereto attached. marked Exhibit
17 "C" and made a part of this petition.

Plaintiff further says. that on the 31st day of July 1900 said defendant made his final proof of residence upon and cultivation of said land, and, notwithstanding the disqualification of defendant aforesaid, said final proof was approved and final receipt issued to said defendant for said land and this plaintiff finally, unlawfully, and wrongfully deprived of said land and his rights in the premises.

Wherefore plaintiff prays for judgment against the said defendant declaring the title so wrongfully issued to him by the Government of the United States to be held in trust for the benefit of this plaintiff and that defendant be required to execute a proper conveyance of said land to this plaintiff, and in the event of the failure or refusal of defendant to execute said conveyance that the decree of the court stand in lieu thereof.

Plaintiff further prays for judgment for the rents and profits of said land in the sum of twenty-five hundred dollars, for the costs of this action and all proper and equitable relief.

S. H. HARRIS,
Attorney for Plaintiff.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 6th*, 1895.

ROBERT L. WINEBRENNER and JOHN T. Smith *vs.* EDWARD C. FORNEY.	Involving H. E. No. 628, Made Sep. 23rd, 1893, for the S. W. ¼, Sec. 19, Town. 26 N., R. 1 E., I. M.

Register and receiver, Perry, O. T.

18 GENTLEMEN: On September 23rd 1893 Edward C. Forney made H. E. No. 628 for the S. W. ¼ sec. 19, town. 26, N. R. 1 E. I. M.

On October 1*th*, 1893, Robert L. Winebrenner filed an affidavit of contest against said entry alleging that Forney is disqualified by reason of having entered "the race" from the Ponca Indian reservation; also that he, (Winebrenner), on September 22nd, 1893, "went upon said tract of land with the intention of claiming the same as a homestead under the homestead laws and that he established his residence thereon at five o'clock of said day, and that he made certain improvements thereon, to wit, a certain well and erected his tent thereon, and that he has ever since said time so continued to occupy the same and reside thereon, and that his right to said tract *are* superior and prior to the rights of all other parties."

On Nov. 3rd, 1893, John T. Smith filed an affidavit of contest

against said entry, alleging that he made a *bona fide* settlement upon the land in controversy, prior to the entry and settlement of Forney, and that Forney made the race from the Ponca Indian reservation.

On Dec. 9th, 1893, Thos. E. Barr filed an affidavit of contest, alleging settlement on the day of the opening and that his was the first legal settlement on the land.

These cases were consolidated and set for trial May 18th, 1894. On this date the parties all appeared and by agreement a continuance to September 3rd, 1894, was ordered. The case finally went to trial Nov. 12th, 1894. The contestant Barr failed to appear and his contest was dismissed. The testimony shows that he sold his improvements to Winebrenner in April 1894, for $250.00.

On November 17th, 1894, you rendered a decision in favor of Forney, holding, in substance, that he is not disqualified by reason of having entered the race from the Ponca reservation, and that neither Winebrenner or Smith had made a valid settlement at the date of Forney's entry. Winebrenner and Smith both appeal from that decision. Forney also appeals from some of your findings of fact which he deems prejudicial to his case.

19 Your decision that Forney was a qualified entryman was in accordance with the ruling of this office in force at the time. That ruling has, however, been reversed by the honorable Secretary. (Cagle *vs.* Mendenhall, 20, L. D. 466.)

The testimony shows that Forney made the race from the Ponca reservation, and according to said decision, he is therefore disqualified from acquiring title to said land and your decision is reversed.

There remains to be determined the question of priority as between Winebrenner and Smith.

The testimony on this point is rather voluminous and much of it irrelevant and contradictory. They were both in the race on the day of the opening. Smith admits that Forney reached the land first, (at 12.25) but states that when he arrived, (about two o'clock), and saw Forney's stake with the time of arrival written on it, he concluded that he, (Forney) must have made the race from one of the reservations on the east and was therefore an illegal settler, and he therefore claimed the land himself and stuck a stake about 18 inches high and wrote his name on an empty tomato can and put it on the top of the stake. He did nothing else at that time but returned immediately to his home in Arkansas City. He states that on the 22nd of September he returned to the land and dug a hole about three feet in diameter and 18 inches deep and stuck another stake. The question as to the date of the digging of this hole appears to have been regarded by the parties as of great importance, and considerable space in the record is occupied with testimony in relation thereto. It is contended by Winebrenner that it was done on the 27th instead of the 22nd as claimed by Smith. Several witnesses testify in support of each contention and the statements of some of them are so positive and flatly contradictory that it would be difficult to arrive at a satisfactory conclusion as to which is correct. I am, however, of the opinion that the point is only of minor impor-

tance in the case and that the merits of the controversy between Winebrenner and Smith are sufficiently manifest from other facts shown to obviate the necessity of deciding upon
20 the preponderance of evidence on the question as to what date Smith dug the hole in question. He states that on September 27th, or later he selected a house site, but did not attempt to make any improvements; that he bought some lumber about October 3rd with which to build a house; that he had the first load of lumber hauled about the 20th and the balance at the end of the month; that he did not commence to build a house until October 23rd, on account of the sickness of one of the children. He moved his family into the house November 28th, 1893, and has lived there ever since. He then had a frame house 16 x 18, a kitchen 12 x 16 and another addition. He states that at this time Winebrenner had "fenced him out" and that he took what he could get, and that he has six or seven acres fenced and under cultivation.

Winebrenner states that he went upon the land upon the day of the opening and intended to begin improvements upon the next day, but did not for the reason that a man named Minor had already made a settlement upon it; that as soon as he learned that Minor had abandoned his settlement he stuck a stake with his name and address upon it, located a house site and began digging a well, dug it about 24 inches wide and 15 or 20 inches deep that day. This occurred on September 22nd. On the 24th of the same month he erected a tent on the land, 10 x 12, in which he slept occasionally until his house was built. He had left his three children with relatives in W. Va., (his wife being dead) until he could provide him with a comfortable home on his claim. He worked out part of the time until about the first part of October. He began building a two-wire fence on about the third or fourth of October and finished it on the 9th. He has over 100 acres now inclosed. He began building his house on the 23rd of October and finished it in three or four days and at once fitted it up and moved into it. He has a hen-house and a well and about forty acres in cultivation. The value of his improvements *are* shown to be considerably in excess of those of Smith.

In view of the foregoing facts, I am of the opinion that the rights of Winebrenner are superior to those of Smith. Winebren-
21 ner swears that at the time he built his tent, on September 24th, he did not see any evidence of Smith's settlement. It is not shown that Smith's stake stuck on the 16th, was still standing, and even if it was it was not sufficient to charge Winebrenner with notice of Smith's claim, in the absence of the former's actual knowledge of its existence. . Besides Smith did not attempt to make any actual and permanent improvements until more than a month after he stuck his stake, and did not attempt to establish residence for nearly two and one-half months. On the other hand Wine- erected his tent within two days after his initial acts of settlement, and on the third night following began sleeping on the land.

For the reasons herein set forth your decision is reversed, Smith's

contest is dismissed, Forney's entry held for cancellation and the land held subject to Winebrenner's right of entry.

You will give due notice of this decision and of the right of appeal.

Respectfully, E. F. BEST,
Acting Commissioner.

EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January 18th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

The Commissioner of the General Land Office.

DEAR SIR: On September 23rd, 1893, Edward C. Forney
22 made homestead entry for the S. W. ¼ of sec. 19, tp. 26, N. R. 1 E. I. M., Perry, Oklahoma. On October 7th, 1893, Robert L. Winebrenner file- a contest against the entry of Forney, alleging that Forney was disqualified because he entered the race from the Ponca reservation. Winebrenner also claimed prior settlement on said land. On November 3rd, 1893, John T. Smith filed a contest alleging prior settlement and alleging that Forney was disqualified for the reason stated by Winebrenner.

The cases were consolidated and heard September 12th, 1894. On the day of the hearing Forney moved to strike from the contest affidavit the charge of disqualification, as it was insufficient upon which to order a hearing. The motion was sustained by the register on the authority of two letters of the Commissioner, dated respectively October 3rd, 1893, in the case of McMannus *vs.* Burns, and November 5th, 1894, in the case of Hartshorn *vs.* Young, which held that the law did not disqualify from entering from an Indian reservation.

On November 17th, 1894, the local office found that Forney was not disqualified by having entered the Territory from the Ponca reservation, and that neither Winebrenner nor Smith had made a valid settlement at the date of Forney's entry.

On July 6th, 1895, your office, speaking of Forney's disqualification, said:

"Your decision that Forney is a qualified entryman is in accordance with the ruling of this office in force at the time, That ruling has, however, been reversed by the Hon. Secretary, (Cagle *vs.* Mendenhall, 20 L. D. 46).

The testimony shows that Forney made the race from the Ponca reservation, and according to that decision he is therefore disqualified from acquiring title to said land, and your decision is reversed."

As between Smith and Winebrenner your office found that the latter had the superior rights. You then decreed that Forney's entry be held for cancellation and the land held subject to Winebrenner's right of entry. From this Forney and Smith both appealed.

On December 6th, 1896, the department overruled the decision in the case of Cagle *vs.* Mendenhall, (20 L. D. 46), upon which your office decision is based, by ruling that entering from an Indian reservation did not disqualify a person to make a homestead entry.

23 Brady *vs.* Williams, 23 L. D.

In view of this and the failure on the part of contestants by preponderance of evidence to show prior settlement, your office decision is reversed, and the entry of Forney will remain intact.

The papers in the case are therewith returned.

Very respectfully, DAVID R. FRANCIS, *Secretary.*

EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 11th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

Motion for Review.

Commissioner of the General Land Office.

SIR: The department on January 18th, 1897, rendered a decision in the case of Robert L. Winebrenner and John T. Smith *vs.* Edward C. Forney involving the S. W. ¼ of sec. 19, T. 26 N. R. 1 E., Perry land district, O. T., reversing the decision of your office dated July 6th 1895, and holding that the defendant Forney was not disqualified from acquiring lands in Oklahoma by reason of having entered the Territory from the boundary of an adjacent Indian reservation. Winebrenner and Smith respectively have filed motions for review of said case. The allegations, (aggregating forty in number), accompanying said motion contend primarily that the departmental decision upon which the case at bar was ruled, (Brady *et al.* *vs.* Williams, 23 L. D. 533), was erroneous and ought to be overruled. Said case of Brady, *et al. vs.* Williams, was decided by the department on review, July 24th, 1897, and the doctrine

24 therein enunciated reaffirmed.

It is now alleged that there is a destinction between the Brady-Williams case and the case now under consideration inasmuch as in the former case "Brady entered from the one-hundred-foot strip and not from the reservation."

This allegation is answered by the original departmental decision in the Brady-Williams case, (23 L. D. 533), and answered directly by the same case on review, (25 L. D. —), which says: "It is argued that those entering from that side were transgressors because of having reached the strip through an Indian reservation; but the fact that one is a transgressor on an Indian reservation would not, of itself, disqualify him from making homestead entry. No such

result is disclosed in the statutes and none such is found in any law or treaty."

The allegation last above referred to is found in the motion filed by counsel for Smith. On the contrary counsel for Winebrenner alleges that Forney was disqualified, notwithstanding the departmental decision in the case of Brady, *et al.* vs. Williams, for the reason that at twelve o'clock noon central standard time, Sep. 16th, 1893, said Forney was upon and within the lands opened to settlement on said date, at a point immediately west of Ponca reservation.

Winebrenner's affidavit makes no such charge as above, but on the contrary alleges that said Forney, at twelve o'clock noon of September 16th, 1893, was in township 25, N. R. 1 E. of I. M., and entered the lands opened to settlement from the position in said T. 25, R. 1 E. I. M.

T. 25, N. R. 1 E. is in the Ponca Indian reservation. The contestant cannot, on motion for review, for the first time, set up a new charge—certainly not one inconsistent with the charge formerly made.

The remaining allegations in each of the motions for review relate to the question of priority of settlement regarding which nothing is offered that has not heretofore been presented to and considered by the department.

25 The motion and accompanying papers are herewith returned.

Very respectfully, THOS. RYAN,
Acting Secretary.

On the back of which said amended petition appears the following endorsement of filing:

Filed March 18, 1901, Jay E. Pickard, clerk, by E. A. Burke, deputy.

And be it further remembered that thereafter and on the 30th day of March, 1901 defendant filed his demurrer to said amended petition which said demurrer is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Demurrer.

26 Comes now the defendant, Edward C. Forney, in the above-entitled cause and demurs to the amended petition of the plaintiff therein and for grounds of demurrer states:

First. That the petition in this case does not contain a sufficient statement of facts to constitute a cause of action by the plaintiff against the defendant or to entitle the plaintiff to the relief prayed for.

Second. That the allegations of fact set forth in the petition are not sufficient to vest in this court sitting as a court of equity the power and authority to review the decision and determination of the Land Department upon the contest claims of plaintiff and defendant for the better right to make entry of the tract of land mentioned and described in the plaintiff's petition.

Third. Because the questions here sought to be litigated in plaintiff's petition are questions which the Congress of the United States has vested the jurisdiction in the Department of the Interior to hear and determine and upon which the action of the Interior Department is final and this court is not vested with power and authority upon any allegations set forth in plaintiff's petition to disturb, vacate or overturn the award of priority of right and better right to this defendant to make entry of said lands.

Fourth. Because the petition shows upon its face that a patent to the tract of land in controversy has not passed from the Government of the United States to this defendant and the petition does not show that the legal title to the land in controversy has ever passed from the Government of the United States and in this particular also fails to state facts sufficient to constitute a cause of action by plaintiff against this defendant.

DALE & BIERER,
Attorneys for Defendant.

On the back of which said demurrer appears the following file-marks:

27 "Filed March 30, 1901, Jay E. Pickard, clerk, by E. A. Burke, deputy."

Be it further remembered that, to wit, on the 5th day of April, this cause coming on for hearing upon the demurrer of said defendant to the amended petition of plaintiff, the court made and entered the following journal entry, in said cause:

In the District Court of Kay County, Territory of Oklahoma.

R. L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Journal Entry.

Now upon this 5th day of April, 1901, this cause comes on for hearing upon the demurrer of the defendant to the amended petition of the plaintiff; plaintiff appearing by S. H. Harris, his attorney, and the defendant appearing by A. G. C. Bierer, his attorney; defendant waives all question as to the sufficiency of the legal title of defendant in the land in question and submits his demurrer upon the question as to the rights of plaintiff in and to the land in question under the facts stated in his amended petition.

After hearing the argument of counsel for the respective parties the court takes said cause under advisement upon said demurrer and gives the parties permission to file written briefs; the defendant to file his brief with the court within twenty days from this date,

after serving a copy thereof — the attorney for plaintiff and the plaintiff to file his brief within twenty days after service upon him of the brief of defendant.

BAYARD T. HAINER, *Judge.*

O K.
S. H. HARRIS,
Attorney for Plaintiff.

28 On the back of which said journal entry appears the following endorsement of filing:
"Filed April 15, 1901. Jay E. Pickard, clerk."

Be it further remembered that this cause coming further on for hearing upon the demurrer of said defendant to the amended petition herein, on the 22nd day of June, 1901, the court made and executed the following journal entry, in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Journal Entry.

Now on this 22nd day of June, 1901, this cause comes on for hearing, the plaintiff appearing by his attorney, S. H. Harris, and the defendants appearing by his attorneys, Dale & Bierer, upon the demurrer of the defendant to the amended petition filed in said cause.

The court having heard the argument on said demurrer and considered the brief of counsel thereon, and being duly advised in the premises doth sustain said demurrer to which the plaintiff excepts.

It is therefore, by the court considered, ordered and adjudged that the demurrer of the defendant to the amended petition of the plaintiff in this cause be and the same is hereby sustained on the grounds that the same does not state facts sufficient to constitute a cause of action against the defendant, to which ruling and judgment of the court the plaintiff excepts.

On application of counsel for plaintiff, plaintiff is allowed thirty days in which to again amend his petition. Defendant is given ten days to plead thereto.

BAYARD T. HAINER, *Judge.*

29 O K.
S. H. HARRIS,
Attorney for Plaintiff.

O K.
DALE & BIERER,
Attorneys for Defendant.

On the back of which said journal entry appears the following file-marks:
"Filed July, 18, 1901, Jay E. Pickard, clerk. By E. A. Burke, deputy.

Be it further remembered that to wit, on the 30th day of September, A. D. 1901, plaintiff filed his second amended petition in said cause, which said second amended petition is in words and figures as follows, to wit:

In the District Court of Kay County, Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
ED. C. FORNEY, Defendant.
} Second Amended Petition.

Comes now the plaintiff above named by leave of court first had and obtained, and files this, his second amended petition, and for cause of action against said defendant alleges and says:

First, that he, the plaintiff is a native-born citizen of the United States of America; that on the 16th day of September, 1893, he was over twenty-one years of age and the head of a family; that prior to the opening to settlement of the country known as the Cherokee Outlet on September, 16th, 1893, this plaintiff had never entered upon, or occupied any portion of the lands embraced in said Outlet; that plaintiff was not then, and is not now the owner of one hundred and sixty acres of land in any State or Territory of the United States or anywhere else; that prior to the time of said opening, plaintiff procured a Booth certificate entitling him to enter a homestead in said Outlet, and at the time of opening said country to settlement, plaintiff was and all the time since has been qualified in all respects to take, hold occupy and acquire title to land in said Outlet under the homestead laws of the United States, and under the laws, rules, proclamation, and regulations relative to said country to settlement.

Plaintiff further says, that on the 16th day of September, 1893, at the hour of twelve o'clock, noon, central standard time, he entered upon said country for the purpose of locating and claiming a homestead as aforesaid, and immediately thereafter entered upon and occupied the southwest quarter of section 19, in township 26, north, range one, east of the Indian meridian in Kay county, Territory of Oklahoma, being a portion of the lands open to settlement as before stated; that shortly after entering said land, this plaintiff believing that said land had been lawfully occupied and claimed by some other person left the same, but returned thereto on the 22nd day of September, 1893, after being informed and satisfied that said land was not lawfully occupied and claimed under the laws of the United States; that on said 22nd day of September this plaintiff occupied said land as a homestead under the laws governing the holding and acquiring of title to said land, and has ever since held and claimed said land as a homestead, and has ever since occupied, improved and cultivated the said land in all respects in accordance with the requirement of the laws, rules and regulations of the United States and the Department of the Interior, and is now fully entitled to a patent therefor by virtue of such compliance with the laws of taking holding and acquiring said land as a homestead.

31 That immediately after said settlement and occupancy of said land and as a part of the work performed thereon by this plaintiff pursuant to the laws of the United States, this plaintiff fenced said claim, dug a well thereon, and put about sixty acres thereof in cultivation, built a residence thereon for himself and family wherein he has ever since resided.

Plaintiff further says, that on the 23rd day of September, 1893 the defendant disregarding the rights of this plaintiff as the first and legal settler upon and occupant of said land, made a homestead entry for said land at the United States land office at Perry, O. T. the said land being located within the district for which said land office was established; that shortly after making such homestead entry the defendant threw down a portion of the plaintiff's fence, and forcibly took possession of about seventy acres of said land and has ever since retained possession thereof unlawfully, forcibly and against the will and protest of this plaintiff.

Plaintiff further says, that within three months after making settlement upon said land as aforesaid, he filed a contest against said homestead entry of the defendant in the United States Land Office in which said contest affidavit this plaintiff alleged in substance, that he settled upon and occupied said land before the settlement or homestead entry of the defendant, and that the said defendant was not qualified to make homestead entry of, or settlement upon said land by reason that he, the said defendant, entered upon and occupied the lands embraced within the country known as the Cherokee Outlet prior to twelve o'clock noon, central standard time, of the 16th day of September, 1893, and subsequent to the act of Congress and proclamation of the President opening said lands to settlement and entry for homestead purposes, and that at the hour of opening said country to settlement, the said defendant was within the outer bound-ry of said country and within the inner bound-ry of one-hundred-foot strip surrounding the said outer bound-ry, and was then and there upon the western bound-ry of that part of said Outlet known as the Ponca reservation; that a hearing of said trial was ordered upon

32 said contest, and on the 12th day of November, 1894 said contest came on for trial and was tried before the register and receiver of said land office at Perry, O. T., and upon consideration of the evidence offered upon said trial, the said register and receiver rendered their decision in favor of said defendant and against this plaintiff; and upon said trial and hearing the said defendant admitted that he had entered upon the said Cherokee Outlet as herein stated; that the said register and receiver found such to be the fact from the evidence in said cause, but notwithstanding such admission and findings of fact, the said register and receiver misunderstanding and misapplying the laws with reference to the disqualifications of the defendant, erroneously and unlawfully found and determined that said defendant was not disqualified by reason of said fact to acquire title to said land under the homestead laws of the United States.

A true and exact copy of said decision and findings of fact of the

said register and receiver is hereto attached marked Exhibit "A," and made a part of this petition.

Plaintiff further says, that in due time and form he appealed from said erroneous and unlawful decision to the Hon. Commissioner of the General Land Office and thereafter and on the 6th day of July, 1895, the said Commissioner reversed the said decision of the local land office and found that this plaintiff was the first and legal settler upon said land, and that plaintiff was entitled to said land as a homestead by virtue of his qualifications and compliance with the laws of the United States; that the said Commissioner also found, and determined that the said defendant was within the outer bound-ry of said lands as hereinbefore set out, and that as a matter of law, he was thereby disqualified to acquire title to said land or to make a valid homestead entry thereon.

A true copy of said decision of the Commissioner of the General Land Office is hereto attached marked Exhibit "B" and made a part of this petition.

Plaintiff further says that the said defendant thereafter appealed from said decision to the Hon. Secretary of the Interior, that
33 upon consideration of said cause upon said appeal, the said Secretary approved the findings of fact that the said defendant had entered upon the said Outlet as herein set out, but the said Secretary then and there misunderstood and misapplied the law in relation to the qualification of said defendant to take and hold said land, and that on the 27th day of January, 1897, the said Secretary erroneously and unlawfully held, decided and determined that the said defendant was not disqualified to acquire said land under the homestead laws of the United States on account of the facts as aforesaid, and also found and determined that the said defendant settled upon and improved said land before the settlement and improvement of this plaintiff.

A true and exact copy of the said decision is hereto attached marked Exhibit "C" and made a part of this petition.

Plaintiff further says, that in due time and form, he filed a motion for a review of said decision of the Secretary of the Interior urging a reconsideration of said erroneous and unlawful decision, and afterwards and on the 11th day of August, 1897, the said Secretary rendered his decision upon said motion, and in said decision again erroneously and unlawfully held, found and determined that the facts herein set out, and as found by the various departments of the Land Office of the United States in reference to the entry of the defendant upon the land in question, did not disqualify the said defendant to take hold and acquire title to said land under the laws of the United States.

A true and exact copy of the decision is hereto attached and marked Exhibit "D" and made a part of this petition. That in all said decisions, findings and determinations, it was found and adjudged that this plaintiff was in all respects qualified to take, hold and acquire title to said land, and that plaintiff was entitled to said land as a homestead, but for the prior and superior rights of said defendant, and but for said unlawful and erroneous conclusions and

misapplications of law, said land would have been awarded to this plaintiff.

Plaintiff further says, that on the 31st day of July, A. D. 1900, said defendant made his final proof of residence upon and
34 cultivation of said land, and notwithstanding the disqualifications of said defendant aforesaid, said final proof was unlawfully and erroneously approved and final or duplicate receipt, #960 issued to the said defendant for said land, and this plaintiff forcibly, unlawfully and wrongfully deprived of said land and his rights, and interests therein.

Plaintiff further says, that afterwards and on the 1st day of October, 1900, the Government of the United States by and through its President, the Hon. William McKinley, executed and delivered to said defendant its patent for said land. A true and exact copy of said patent is hereto attached and marked Exhibit "E" and made a part of this petition.

Plaintiff further says, that the said defendant has paid out and expended in procuring the said final receipt and patent, the following items and amounts:

Costs final proof	$5.25
Costs publication of notice	4.00
Costs of filing homestead entry	14.00

That plaintiff now tenders to the said defendant all of the aforesaid sums and brings the same into the court and offers to deposit the same in the court, or where directed by the court, and offers to pay into the court, or according to its orders and directions any other sum or sums expended by the said defendant for which the plaintiff should make payment, or which may be found by the court to be due from this plaintiff to the said defendant.

Wherefore, plaintiff prays judgment against the said defendant declaring the said title so unlawfully issued to him by the Government of the United States to be illegal and void as to the said defendant, and to be held in trust for the use and benefit of this plaintiff, and that defendant be required to execute a proper and legal conveyance of said land to this plaintiff, and in the event of failure or refusal to execute said conveyance, that a decree of this court be granted in lieu thereof, for the costs of this action and a proper relief.

S. H. HARRIS,
Attorney for Plaintiff.

35 EXHIBIT "A."

Before the United States Land Office at Perry, O. T.

ROBERT L. WINEBRENNER, JOHN T. Smith
vs.
EDWARD C. FORNEY.
} Involving S. W. ¼ Section 19, Township 26 North, of Range 1 East, I. M.

Decision of Register and Receiver.

The register being present during the taking of testimony.

The defendant E. C. Forney, made homestead entry on the 23rd of September, 1893.

The contestant Robert L. Winebrenner filed affidavit of contest, among other things, charging that he was the first settler on said land, and that said settlement was prior to the entry of said Forney.

(Smith)*

John T. Forney A filed his affidavit of contest, claiming and alleging, among other things, that he was the first settler, and that said settlement was prior to any settlement made by Winebrenner of the defendant; and prior to the entry on said land.

While the record in this case, we think, is unnecessarily voluminous, and the testimony, on many minor points, contradictory and irreconcilable, yet, to our minds, the issues are simple enough, and the evidence, taken as a whole, sufficiently clear to enable us to render our decision with little or no difficulty.

The one question which elicited more testimony than any other in this case, was which of the two contestants was the first to settle upon the land. Smith claims to have reached the land on the 16th of September, 1893, and that he then and there laid claim to the same, and while there staked the same with a stake about eighteen inches high. He found other evidence of ini-atory acts of settlement which had Forney's name on them, and which he subsequently learned were made by Forney, prior to the time he reached the land; and that he laid claim to the land because he thought
36 the party who made them must necessarily be disqualified. (See his testimony.)

We are of the opinion that, even though Forney had been disqualified, the mere entry on the land on the 16th, and the sticking of a stake eighteen inches high, such as he describes in his testimony, were not sufficient acts of settlement, as would confer on him any rights. The idea that a state such as he mentioned in his testimony would be of any avail to him in segregating the land from the public domain, in our minds, is absurd; or that he could follow such an act up in the face of the adverse rights of other parties, we think would violate every principle of law and justice, and open the floodgates for frauds and perjuries of every conceivable kind,

[* In pencil in copy.]

in these contest cases. The only kind of initial acts that would avail one in these contests must be so open, conspicuous, and notorious as would put any ordinary prudent man on notice that some one was claiming that particular piece of land, and be so closely connected with residence as to leave no doubt of the good faith of the party who made them. To accept any other rule begets doubts, and uncertainties and confusions. We have said this much on this particular point in this case, so that the public and the parties to the hundreds of contest cases in this office may, in the conduct of these cases, know and understand that in the disposal of these cases we will adhere to these plain common-sense rules in determining the rights of the parties, and to the end that when understood it will save an enormous amount of money, now expended for masses of irrelevant testimony.

Therefore, this stake eighteen inches high could not save one hundred and sixty acres of land from appropriation by the first comer who took possession, and began improving the same, in a permanent manner, and in such a way as would be reasonably expected of a man who expected to make it his home, especially so when he had no notice of the first party's claim; contestant Smith claims to have made no other improvements, or done any other acts indicative of intention to settle upon the land, until the 22nd day of September. On this day he claims to have returned to the land and dug a hole about eighteen inches deep, and between three and four feet in diameter. This is all he claims to have
37 done on the land prior to the time he sent his lumber down there by his son for the purpose of building his house which was on the 4th or 5th of October. He claims to have been on the land on the 25th of September, with his son, for the purpose of selecting a site for his house, but did nothing on that day. The only thing up to the 4th or 5th of October that smacked of initial acts of settlement was the eighteen-inch elm stick stuck on the 16th of September, and the hole dug on the 22nd of the same month, and this is giving him credit for all he claims.

We admit that the locality and its accessibility to the outside world, the circumstances of the party, the general condition of the country, and the seasons would have something to do in determining the reasonableness or unreasonableness of the time in which some substantial acts should be done by a party claiming to have settled upon and segregated the land, to date from some previous initial act. But in this case, when this country was overrun with thousands of homeseekers, five or six days elapsed between the sticking of the first little stick, and the digging of the hole on the 22nd of September. Mr. Smith lived at Arkansas City, not more than twenty or twenty-five miles from the land. Between the digging of the hole on the 22nd and his return to the land on the 27th five more days elapsed, and still on this day nothing was done on the land. Such is the case up to the 5th of October, as Smith makes it, at which time he seems to have been in earnest for the first time in appropriating the land.

But all of the foregoing is contested every step, and a great amount

of the testimony in the record goes to the proving or disproving of these acts at the time claimed; just when the hole was dug by Smith we cannot undertake to say, nor do we think it necessary, for we are of the opinion that Smith's settlement began at the time when he hauled his first load of lumber, and that while it is true he had his eye on this land up to this time, he never undertook to seize upon it until he was convinced that the defendant was disqualified by reason of entering from the Ponca reservation. He himself
38 so admits, and then, and not until then, did he manifest his intention by his acts.

What has been said in regard to Smith may, in many instances be applied, to the case as made by Winebrenner.

He claimed nothing before the 22nd of September. And here, again, we find a party on the 22nd (who was on the land on the 16th of September) digging a hole, which is termed a well, twenty inches deep and twenty-four inches across. This little hole, at this late date, is seriously contended to have virtue and potency enough to spread its influence over one hundred and sixty acres of land, and segregate the same from the public domain. We think there is no saving grace in a hole dug at this late, for certainly there can be no reason why a more visible, valuable and permanent improvement could not have been made by which honest settlers would not be ensnared into lawsuits.

While it is not contended that this little hole was not dug, and afterwards plowed over by Forney, yet we can see no good reason for giving him any credit for the same. Evidently he was in the same frame of mind regarding the prior claims to this land by some one else as was Smith. While Smith feared Forney, Winebrenner feared Minor and Forney.

On the 25th he put a tent on the land; at least the tent was on the land when Smith came down on the 27th, for he saw it. Now it will not be contended but that a tent ten by twelve is infinitely superior in every respect, for the purpose of notifying the world that a person who places it on a quarter section of land intends to make some claim to the land, than sticks and small holes stuck and dug in and upon some nook or corner of the prairie or timber, which is not apparent to ordinary observers.

We would therefore, date Winebrenner's settlement from the 25th of September, the date of placing the tent on the land. As to the other subsequent improvements of Winebrenner and Smith, see their statements in regard thereto, the value of which alone is disputed.

Forney offers no evidence in this case, except that which he obtains by cross-examination of the witnesses of both contest-
39 ants. And this testimony goes to establish the fact that Forney ran from a point along the Ponca Indian reservation, and reached the land at about 12.24 p. m.; and that he only had to go two and a half miles to reach the land from where he started.

The evidence tends to show that certain holes, stakes and a tree set out on the 16th, *was* put there by Forney (see testimony of Smith, Hamilton, and Shup, as well as other witnesses in the case). But

Mr. Forney did not claim the same by his own testimony, and chose to rest upon his entry. And we think he chose well, for following the rule laid down in McManus *vs.* Sam. J. Burns, G. L. O. letters Oct. 23, 1891, he was a qualified entryman, and being such he got his entry of record on the 23rd of September, 1893, which was prior to any acts of settlement made by either of the contestants.

We think that the contestants have each failed to make out a case; and therefore we find in favor of defendant, and recommend the confirmation of his entry.

Thirty days for appeal.

LOUIS DAVIS, *Register.*
J. H. KING, *Receiver.*

We hereby accept service of the foregoing decision and acknowledge receipt of a true copy of the same this 17 day of Nov. 1894.

MORRIS & JOHNSON,
Att'ys for Smith.
MORGAN & PANCOAST,
Att'ys for Winebrenner.

EXHIBIT B.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *July 6th*, 1895.

40 ROBERT L. WINEBRENNER and John T. Smith *vs.* EDWARD C. FORNEY. } Involving H. E. No. 628, made Sep. 23rd, 1893, for the S. W. ¼ Sec. 19, Town 26 N., R. 1 E., I. M.

Register and receiver, Perry, O. *Y.*

GENTLEMEN: On September 23rd, 1893, Edward C. Forney made H. E. No. 628 for the S. W. ¼ sec. 19, town 26, N. R. 1 E. I. M.

On October 1st, 1893, Robert L. Winebrenner filed an affidavit of contest against said entry alleging that Forbey is disqualified by reason of having entered "the race" from the Ponca Indian reservation; also, that he, (Winebrenner), on September 22nd, 1893, "went upon said tract of land with the intention of claiming the same as a homestead under the homestead laws and that he established his residence thereon at five o'clock of said day, and that he made certain improvements thereon to wit, a certain well and erected his tent thereon, and that he has ever since said time so continued to occupy the same and reside thereon, and that his right to said tract are superior and prior to the rights of all other parties."

On Nov. 3rd, 1893, John T. Smith filed an affidavit of contest against said entry, alleging that he made a *bona fide* settlement upon the land in controversy, prior to the entry and settlement of Forney, and that Forney made the race from the Ponca Indian reservation.

On Dec. 9th, 1893, Thos. E. Barr filed an affidavit of contest al-

leging settlement on the day of the opening and that his was the first legal settlement on the land.

These cases were consolidated and set for trial May 18th, 1894. On this date the parties all appeared and by agreement a continuance to September 3rd, 1894, was ordered. The case finally went to trial Nov. 12th, 1894. The contestant Barr failed to appear
41 and his contest was dismissed. The testimony shows that he sold his improvements to Winebrenner in April, 1894, for $250.00.

On November 17th, 1894, you rendered a decision in favor of Forney, holding, in substance, that he is not disqualified by reason of having entered the race from the Ponca reservation and that neither Winebrenner or Smith had made a valid settlement at the date of Forney's entry. Winebrenner and Smith both appealed from that decision. Forney also appeals from some of your findings of fact which he deems prejudicial to his case.

Your decision that Forney was a qualified entryman was in accordance with the ruling of this office in force at the time. That ruling, has, however, been reversed by the honorable Secretary (Cagle *vs.* Mendenhall, 20 L. D. 446).

The testimony shows that Forney made the race from the Ponca reservation, and according to said decision, he is therefore disqualified from acquiring title to said land and your decision is reversed.

There remains to be determined the question of priority as between Winebrenner and Smith.

The testimony on this point is rather voluminous and much of it irrelevant and contradictory. They were both in the race on the day of the opening. Smith admits that Forney reached the land first (at 12.25), but he states that when he arrived, (about two o'clock), he saw Forney's stake with the time of arrival written on it, he concluded that he, (Forney) must have made the race from one of the reservations on the east, and was therefore an illegal settler, and he therefore claimed the land himself and stuck a stake about 18 inches high and wrote his name on an empty tomato can and put it on the top of the stake. He did nothing else that time but returned immediately to his home in Arkansas City. He states that on the 22nd day of September he returned to the land and dug a hole about three feet in diameter and 18 inches deep and stuck another stake. The question as to the date of the digging of this hole appears to have been regarded by the parties as of great importance, and consid-
42 erable space in the record is occupied with testimony which relates thereto. It is contended by Winebrenner that it was done on the 27th instead of the 22nd as claimed by Smith. Several witnesses testify in support of each contention and the statements of some of them are so positive and flatly contradictory that it would be difficult to arrive at a satisfactory conclusion as to which is correct. I am, however, of the opinion that the point is only of minor importance in the case and that the merits of the controversy between Winebrenner and Smith are sufficiently manifest from other facts shown to obviate *that* the necessity of deciding upon the preponderance of evidence on the question as to what date Smith dug

the hole in question. He states that on September 27th, or later he selected a house site, but did not attempt to make any improvements; that he bought some lumber about October 3rd with which to build a house; that he had the first load of lumber hauled about the 20th and the balance at the end of the month; that he did not commence to build a house until October 23rd, on account of the sickness of one of the children. He moved his family into the house November 28th, 1893, and has lived there ever since. He then had a frame house 16 x 18, a kitchen 12 x 16 and another addition. He states that at this time Winebrenner had "fenced him out" and that he took what he could get, and that he has six or seven acres fenced and under cultivation.

Winebrenner states that he went upon the land the day of the opening and intended to begin improvements upon the next day, but did not for the reason that a man named Minor had already made a settlement upon it; but as soon as he learned that Minor had abandoned his settlement he stuck a stake with his name and address upon it, located a house site, and began digging a well, dug it about 24 inches wide and 15 or 20 inches deep that day. This occurred on September 22nd. On the 24th of the same month he erected a tent on the land, 10 x 12, in which he slept occasionally until his house was built. He had left his three children with relative- in W. Va., (his wife being dead) until he could provide him with a comfortable home on his claim. He worked out part
43 of the time until about the first part of October. He began building a two-wire fence on about the third or fourth of October and finished it on the 9th. He has over 100 acres now enclosed. He began building his house on the 23rd of October and finished it in three or four days and at once fitted it up and moved into it. He has a hen-house, a well and about forty acres in cultivation. The value of his improvements *are* shown to be considerably in excess of those of Smith.

In view of the foregoing facts I am of the opinion that the rights of Winebrenner are superior to those of Smith. Winebrenner swears that at the time he built his tent, on September 24th, he did not see any evidence of Smith's settlement. It is not shown that Smith's stake stuck on the 16th, was still standing, and even if it was it was not sufficient to charge Winebrenner with notice of Smith's claim, in the absence of the former's actual knowledge of its existence. Besides Smith did not attempt to make any actual and permanent improvements until more than a month after he stuck his stake, and did not attempt to establish residence for nearly two and one-half months. On the other hand Winebrenner erected his tent within two days after his initial acts of settlement, and that on the third night following began sleeping on the land.

For the reasons herein set forth your decision is reversed, Smith's contest is dismissed, Forney's entry held for cancellation and the land held subject to Winebrenner's right of entry.

You will give due notice of this decision and of the right of appeal.

Respectfully,

E. F. BEST,
Acting Commissioner.

44 EXHIBIT "C."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *January 18th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

The Commissioner of the General Land Office.

DEAR SIR: On September 23rd, 1893, Edward C. Forney made homestead entry for the S. W. ¼ of sec. 19, tp. 26, N. R. 1 E., I. M. Perry, Oklahoma. On October 7th, 1893, Robert L. Winebrenner filed a contest against the entry of Forney, alleging that Forney was disqualified because he entered the race from the Ponca reservation. Winebrenner also claimed prior settlement on said land. On November 3rd, 1893, John T. Smith also filed a contest alleging prior settlement and alleging that Forney was disqualified for the reason stated by Winebrenner.

The cases were consolidated and heard September 12th, 1894. On the day of the hearing Forney moved to strike from the contest affidavit the charge of disqualification, as it was insufficient upon which to order a hearing. The motion was sustained by the register on the authority of two letters of the Commissioner dated respectively October 3rd, 1893, in the case of McManus *vs.* Burns, and and November 5th, 1894, in the case of Hartshorn *vs.* Young, which held that the law did not disqualify from entering from an Indian reservation.

On November 17th, 1894, the local office found that Forney was not disqualified by having entered the Territory from the Ponca reservation, and that neither Winebrenner nor Smith had made a valid settlement at the date of Forney's entry.

On July 6th, 1895, your office, speaking of Forney's disqualification said:

45 "Your decision that Forney is a qualified entryman is in accordance with the ruling of this office in force at the time. That ruling has, however, been reversed by the Hon. Secretary, (Cagle *vs.* Mendenhall, 20 L. D. 46.)

"The testimony shows that Forney made the race from the Ponca reservation, and according to that decision, he is therefore disqualified from acquiring title to said land, and you- decision is reversed."

As between Smith and Winebrenner your office found that the latter had the superior rights. You then decreed that Forney's entry be held for cancellation and the land held subject to Winebrenner's right of entry. From this Forney and Smith both appealed.

On December, 6th, 1896, the department overruled the decision in the case of Cagle *vs.* Mendenhall, (20 L. D. 46), upon which your office decision is based, by ruling that entering from and Indian reservation did not disqualify a person to make a homestead entry.

Brady *vs.* Williams, 23 L. D.

In view of this and the failure on the part of contestants by preponderance of evidence to show prior settlement, your office decision is reversed, and the entry of Forney will remain intact.

The papers in the case are herewith returned.

Very respectfully, DAVID R. FRANCIS, *Secretary.*

EXHIBIT "D."

DEPARTMENT OF THE INTERIOR,
WASHINGTON, *August 11th*, 1897.

ROBERT L. WINEBRENNER and JOHN T. SMITH
vs.
EDWARD C. FORNEY.

Motion for review.

Commissiener of the General Land Office.

SIR: The department on January 18th, 1897, rendered a decision in the case of Robert L. Winebrenner and John T. Smith *vs.* Edward C. Forney, involving the S. W. ¼ of sec. 19, T. 26, N. R. 1 E.,
46 Perry, land district, O. T., reversing the decision of your office dated July 6th, 1895, and holding that the defendant Forney was not disqualified from acquiring lands in Oklahoma by reason of having entered the Territory from the boundary of an adjacent Indian reservation. Winebrenner and Smith respectively have filed motions for review of said case. The allegations, (aggregating forty in number), accompanying said motion conte-d primarly that the departmental decision upon which the case at bar was ruled (Brady, *et al. vs.* Williams, 23, L. D. 533), was erroneous and ought to be overruled. Said case of Brady, *et al. vs.* Williams was decided by the department on review, July 24th, 1897, and the doctrine therein enunciated reaffirmed.

It is now alleged that there is a distinction between the Brady-Williams case and the case now under consideration inasmuch as in the former case "Brady entered from the one-hundred-foot strip and not from the reservation."

This allegation is answered by the original departmental decision in the Brady-Williams case, (23 L. D. 533), and answered directly by the same case on review, (25 L. D.), which says: "It is argued that those entering from that side were transgressors because of having reached the strip through an Indian reservation; but the fact that one is a transgressor on an Indian reservation would not, of itself, disqualify him from making homestead entry. No such result is disclosed in the statutes and none such is found in any law or treaty."

The allegation last above referred to is found in the motion filed by counsel for Smith. On the contrary counsel for Winebrenner alleges that Forney was disqualified, notwithstanding the departmental decision in the case of Brady, *et al. vs.* Williams, for the reason that at 12 o'clock noon central standard time Sept. 16th, 1893, said

Forney was upon and within the lands opened to settlement on said date, at a point immediately west of Ponca reservation.

Winebrenner's affidavit makes no such charge as above, but on the contrary alleges that said Forney, at 12 o'clock noon of Sep-
47 tember 16th, 1893, was in township 25, N. R. 1 E. of I. M. and entered the lands opened to settlement from the position in said T. 25 R. 1 E. I. M.

T. 25, N. R. 1 E. is in the Ponca Indian reservation. The contestant cannot, on motion for review, for the first time, set up a new charge—certainly not one inconsistent with the charge formerly made.

The remaining allegations in each of the motions for review relates to the question of priority of settlement regarding which nothing is offered that has not heretofore been presented to and considered by the department.

The motion and accompanying papers are herewith returned.

Very respectfully, THOS. RYAN
Acting Sec'ty.

EXHIBIT "E."

The United States of America, to all to whom these presents shall come, Greeting:

Homestead certificate No. 960; application —.

Whereas, there has been deposited in the General Land Office of the United States a certificate of the register of the land office at Perry, O. T., whereby it appears that pursuant to the act of Congress approved May 20th, 1862, "To secure homesteads to actual settlers on the public domain," and the acts supplemental thereto, the claim of Ed. C. Forney has been established and duly consum-ated, in conformity to law, for the southwest quarter of section nineteen, in township twenty-six, north, range one, east of the Indian meridian in Kay county, Territory of Oklahoma, containing one hundred and sixty acres, according to the official plat of the survey of said land returned to the General Land Office unto the said Ed. C. Forney.

Now know ye, that there is, therefore, granted by the United States unto the said Edward C. Forney *to* tract of land above
48 described; to have and to hold the said tract of land, with the appurtenances thereof, unto the said Edward C. Forney, and to his heirs and assigns forever.

In testimony whereof, I, William McKinley, President of the United States of America *has* caused these letters to be made patent, and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington the first day of October, A. D. 1900, and of the Independence of the United States the one hundred and twenty-fourth.

By the President,

WILLIAM McKINLEY.
By F. M. McKEAN, *Secretary,*
By C. W. BENSH,
Recorder of the General Land Office.

On the back of which said second amended petition appears the following file-marks:
"Filed Sept. 30, 1901, Jay E. Pickard, clerk."

Be it further remembered that to wit, on the 30th day of September, 1901, the defendant herein filed his demurrer to the second amended petition of plaintiff, which said demurrer is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } Demurrer.

Comes now the defendant, Edward C. Forney, in the above-entitled cause and demurs to the second amended petition of the plaintiff therein and for grounds of demurrer states:

First. That the second amended petition in this case does not contain a sufficient statement of facts to constitute a cause of
49 action by the plaintiff against the defendant or to entitle the plaintiff to relief prayed for.

Second. That the allegations of facts set forth in the petition are not sufficient to vest in this court sitting as a court of equity the power and authority to review the decision and determination of the Land Department upon the contest claims of plaintiff and defendant for the better right to make entry of the tract of land mentioned and described in the plaintiff's petition.

Third. Because the questions here sought to be litigated in plaintiff's petition are questions which Congress of the United States has vested the jurisdiction in the Department of the Interior to hear and determine and upon which the action of the Interior Department is final and this court is not vested with power and authority upon any allegations set forth in plaintiff's petition to disturb, vacate or overturn the award of priority of right and better right to this defendant to make entry of said lands.

DALE & BIERER,
Attorneys for Defendants.

On the back of which said demurrer to said second amended petition is endorsed the following marks of filing:
"Filed Sept. 30, 1901, .Jay E. Pickard, clerk."

Be it further remember-, that, to wit, on the 7th day of October, A. D. 1901, this cause coming on for hearing upon the demurrer of defendant to the second amended petition of plaintiff, and the court having heard the arguments of counsel, and being fully advised in the premises, m- le the following journal entry of judgment, which is in words and figures as follows, to wit:

In the District Court of Kay County, Oklahoma Territory.

50 ROBERT L. WINEBRENNER, Plaintiff,
vs.
EDWARD C. FORNEY, Defendant. } # 1645. Journal Entry.

And now upon this 7th day of October, A. D. 1901, the same being one of the regular judicial days of the September, 1901, term of the above-entitled court this cause comes on for hearing upon the demurrer of the defendant to the second amended petition of the plaintiff; the plaintiff appeared by S. H. Harris, his attorney, and the defendant appearing by J. F. King, and A. C. G. Bierer, his attorneys; and upon consideration of said demurrer and being advised in the premises the said demurrer is by the court sustained, to which ruling of the court plaintiff excepts.

Whereupon the plaintiff declines to ask permission to further plead and elects to stand upon his second amended petition.

It is therefore by the court considered, ordered and adjudged that plaintiff's action be and the same is hereby dismissed and that the defendant recover of the said plaintiff all costs taxed herein in the sum of — dollars, to all of which the said plaintiff excepts.

At plaintiff's request the time for making and serving the case-made herein is extended thirty days; the defendant given five days thereafter to suggest amendments; the said case-made to be settled upon three days' notice in writing by either party to the other of the time and place of said settlement. Execution for costs herein is stayed for the period of thirty days and if the said plaintiff gives a good and sufficient supersedeas bond within said thirty days, then execution herein is stayed until final judgment in this cause, pursuant to the determination thereof upon proceedings in error in the Supreme Court.

BAYARD T. HAINER, *Judge.*

O. K.

——— ———,
Attorney for Plaintiff.

O. K.

——— ———,
Attorney for Defendant.

51 On the back of which said journal entry appears the following endorsement of filing:

"Filed for record this 7th day of October, 1901. Jay E. Pickard, clerk, by E. A. Burke, deputy."

The foregoing contains a true and correct statement of all the pleadings, motions, orders, evidence, findings and proceedings upon which judgment was rendered.

S. H. HARRIS,
Att'y for Pl'tf.

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

We, the undersigned, attorneys for the defendant in the foregoing suit, certify that the foregoing case-made was duly served on us this 25th day of October, 1901.

DALE & BIERER,
Attorneys for Defendant.

Filed Dec. 6, 1901,

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

We, the undersigned attorneys for Edward C. Forney, defendant in the above-entitled cause, hereby waive time for submitting amendments thereto, as well as notice of time and place of settlement, of said case-made, and agree that the same may be settled,
52 signed, and certified by the judge who presided at the trial in the district court at any time or place.

Dated at Guthrie, O. T. this 31st day of October, A. D. 1901.

DALE & BIERER,
Attorneys for Defendant.

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
County of Kay, }

This is to certify, that the foregoing above case-made has been duly served in due time, and the same duly submitted to me for settlement and signing, as required by law, by the parties to said cause; that the same as above set forth, and as corrected by me, is true and correct and contains a true and correct statement of all the pleadings, motions, orders, evidence, findings, proceedings and judgments had in such case; and I hereby settle, allow, certify, and sign the same as true and correct, and hereby order that the clerk of the district court attest the same with the name and seal of said court, and file the same of record as provided by law.

Witness my hand, at Tecumseh, O. T. the 22nd day of November, 1901.

[SEAL.] BAYARD T. HAINER,
Judge of the District Court of Kay County, Oklahoma Territory, and the Judge Who Tried said Cause.

Attest:

JAY E. PICKARD, *Clerk,*
53 By E. A. BURKE, *Deputy.*

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

TERRITORY OF OKLAHOMA, } ss:
Noble County, }

S. H. Harris, being first duly sworn on his oath states that legal and proper cost of the foregoing case-made is $18.00, which amount has been paid by plaintiff in error.

S. H. HARRIS.

Subscribed and sworn to before me this 5th day of December, A. D. 1901.

[SEAL.] ROBERT E. EVANS,
Notary Public.

My commission expires Oct. 5, 1905.

Filed Dec. 6, 1901.

BENJ. F. HEGLER,
Clerk Supreme Court,
By JESSIE PARDOE, *Deputy.*

54 [Endorsed:] 1169. Winebrenner *vs.* Forney. Petition in error and case-made. Filed in the office of the district court of Kay county, Oklahoma Territory this 25th day of November, 1901. Jay E. Pickard, clerk, by E. A. Burke, deputy. Filed Dec. 6, 1901. Benj. F. Hegler, clerk supreme court, by Jessie Pardoe, deputy.

55 And thereafter, at the January, 1902, term of said supreme court, on the fourteenth day of January, 1902, the following proceeding was had in said cause to wit:

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } #1169.

Come now S. H. Harris, attorney for plaintiff in error, and A. G. C. Bierer, attorney for defendant in error, and waive oral argument in this cause; and the same is submitted on record and briefs — both parties.

56 And thereafter at the June, 1902, term of said supreme court, on the sixteenth day of June, 1902, the following proceeding was had in said cause, to wit:

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } #1169.

And now this cause comes on for final consideration and determination by the court upon the record and briefs submitted therein.

And the court having duly considered the same, and being fully advised in the premises, finds: That the judgment of the lower court in this cause should be affirmed, at the cost of plaintiff in error.

It is therefore ordered and adjudged by the court, that the judgment of the lower court in this cause be and the same is hereby affirmed, at the cost of plaintiff in error.

Opinion by Burwell, J., Burford, C. J., and Gillette and Beauchamp, JJ., concurring; Hainer, J., who tried the cause below, and Pancoast, J., who was of counsel, not sitting; Irwin, J., absent.

And said opinion in said cause reads in words and figures as follows, to wit:

57 In the Supreme Court of the Territory of Oklahoma, June Term, 1902.

Filed July 16, 1902.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } No. 1169.

Syllabus.

Public lands—Who not disqualified to enter.—One who was within the Ponca Indian reservation before the hour of 12 o'clock noon (central standard time) of September 16th, 1893, and made the race from said reservation into that part of the Cherokee Outlet which was opened to settlement on that day, is not by reason thereof, disqualified from settling upon and filing a homestead entry upon a quarter section of land within the country then declared open to settlement.

Appeal from the district court of Kay county. Bayard T. Hainer, trial judge. Affirmed.

S. H. Harris, for appellant.
Dale & Bierer, for appellee.

Opinion of the court by BURWELL, *J.*:

This case involves the question as to whether one who made the race into the Cherokee Outlet, on September 16th, 1893, from the west line of the Ponca Indian reservation is a "sooner," and therefore disqualified to make homestead entry of any of the lands thrown open to settlement by the President's proclamation dated August 19th, 1893. Edward C. Forney made the run into the Cherokee Outlet on the day of the opening and made homestead entry on the land in controversy, which is the southwest quarter of section nineteen, of township twenty-six north, of range one east of the Indian meridian, in Kay county.

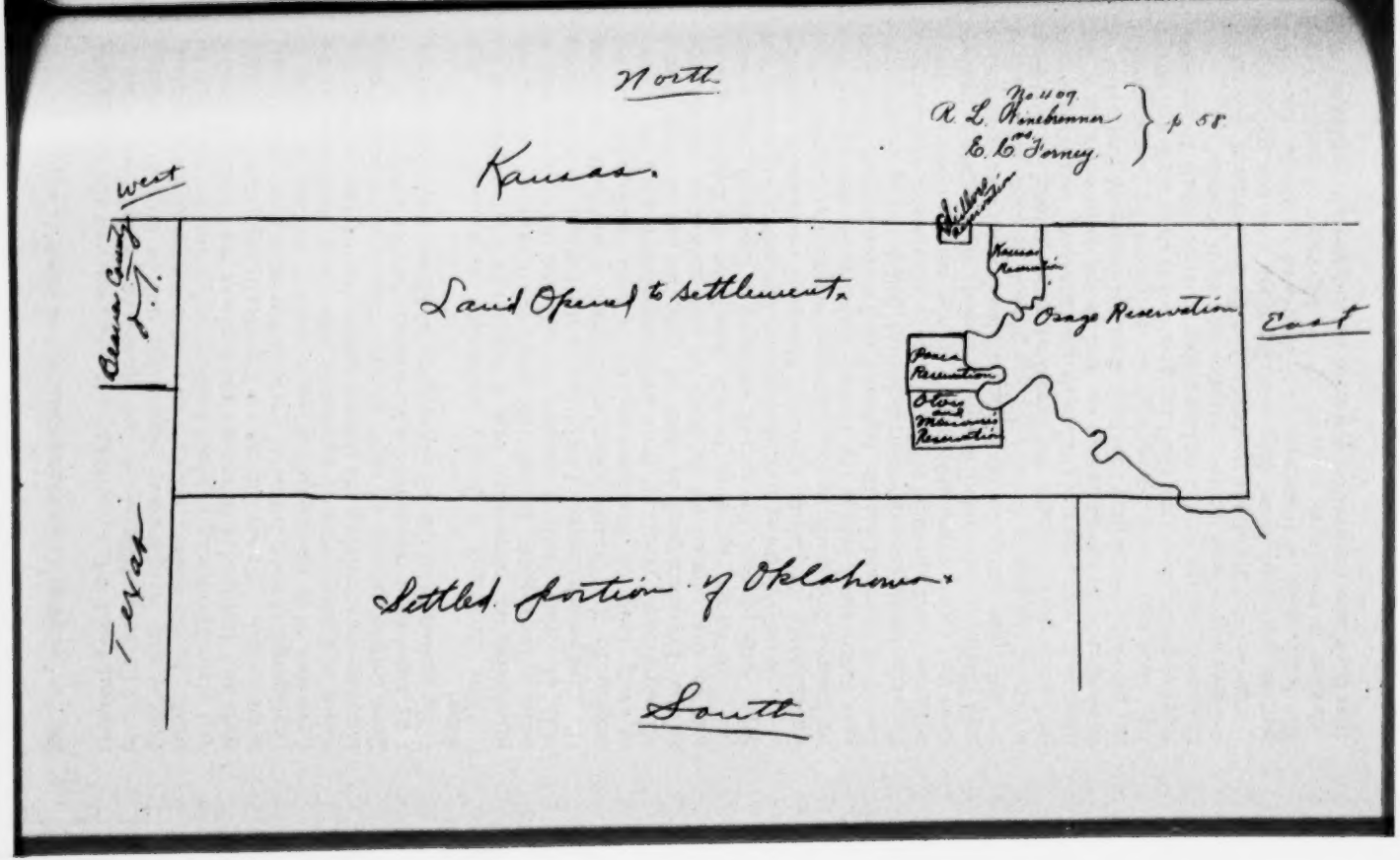
Robert L. Winebrenner filed a contest against Forney on the grounds of prior settlement and "soonerism." The contest was tried in the local land office, then appealed to the Commissioner of the

General Land Office and then to the Secretary of the Interior, who found in favor of Forney on both questions. Patent was issued to Forney and Winebrenner began this suit to declare a resulting trust. In the district court a demurrer to the petition was sustained, and plaintiff refusing to plead further, judgment for defendant for costs and dismissal of the action was rendered, and plaintiff appealed to this court. We are inclined to the opinion that this case might be disposed of upon technical grounds but as counsel on both sides have seen fit to waive every question except the one of disqualification of Forney, we will, because of the many other cases in the lower courts involving the same question, decide that point so that these parties, as well as other persons interested in similar cases, may know their respective rights without further delay.

By section 14 of the act of Congress of March 2nd, 1889, it is provided:

"The President is hereby authorized to appoint three commissioners, not more than two of whom shall be members of the same political party, to negotiate with the Cherokee Indians and with all other Indians owning or claiming lands lying west of the ninety-sixth degree of longitude in the Indian Territory for the cession to the United States of all their title, claim, or interest of every kind or character in and to said lands, and any and all agreements resulting from such negotiation shall be reported to the President and by him to Congress at its next session and to the counsel or counsels of the nation or nations, tribe or tribes, agreeing to the same for ratification, and for
57½ this purpose the sum of twenty-five thousand dollars, or as much thereof as may be necessary, is hereby appropriated, to be immediately available: Provided, that said commission is further authorized to submit to the Cherokee nation the proposition that said nation shall cede to the United States in the manner and with the effect aforesaid, all the rights of said nation in said lands upon the same terms as to payment as is provided in the agreement made with the Creek Indians of date January nineteenth, eighteen hundred and eighty-nine, and ratified by the present Congress; and if said Cherokee nation shall accept, and by act of its legislative authority duly pass, ratify the same, the said lands shall thereupon become a part of the public domain for the purpose of such disposition as is herein provided, and the President is authorized as soon thereafter as he may deem advisable, by proclamation, to open said lands to settlement in the same manner and to the same effect, as in this act provided concerning the lands acquired from said Creek Indians, but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision thall be permitted to enter any of said lands or acquire any right thereto."

Counsel for appellant contends that by the terms of this act all persons were prohibited from entering upon and occupying any of the lands west of the ninety-sixth degree of longitude, no matter whether it was lands claimed by the Cherokee or other Indians; that the Ponca reservation is west of the ninety-sixth degree of longi-


North
R. L. Pinchbonner No 1109
E. C. Forney } p 58
Kansas.
West
Land Opened to Settlement.
Osage Reservation
East
Texas
Settled portion of Oklahoma.
South

tude and therefore no one could go upon it until thrown open to settlement, which has not yet been done. It is true that the section just quoted provides that no person shall be permitted to enter upon and occupy any of the lands referred to and that no person violating the provisions hereof shall be permitted to enter any of the lands described or acquire any right thereto, and it is also true that this section includes the Ponca Indian reservation, but this act must be considered in the light of subsequent acts of Congress, and the President's proclamation opening the Cherokee lands to settlement; and in order that a more complete understanding of the facts may be had we here give a map of these different reservations and lands:

(Here follows diagram marked p. 58.)

59 We will now notice the provisions of section ten of the act of Congress of March 3rd, 1893:

"The President of the United States is hereby authorized, at any time within six months after the approval of this act and the acceptance of the same by the Cherokee nation as herein provided, by proclamation, to open to settlement any or all of the lands not allotted or reserved, in the manner provided in section thirteen of the act of Congress approved March the second, eighteen hundred and eighty-nine, entitled 'An act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June the thirtieth, eighteen hundred and ninety, and for other purposes, etc."

Section thirteen of the act of March second, 1889, refers to what sections shall be reserved for school land, length of residence, amount to be paid, qualifications of entrymen, etc., and then section ten of the act of March 3d, 1893, concludes:

"No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands. The Secretary of the Interior, shall, under the direction of the President prescribe rules and regulations, not inconsistent with this act, for the occupation and settlement of said lands, to be incorporated in the proclamation of the President, which shall be issued at least twenty days before the time fixed for the opening of said lands."

Then finally in the President's proclamation we find this language:

"Said lands so to be opened as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

A strip of land, one hundred feet in width, around and immediately within the outer boundaries of the entire tract of the country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, viz:

Said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet, shall be opened to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass, or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby."

Appellant insists that it was intended by this language to set apart a strip of land one hundred feet wide around all of the Indian country west of the ninety-sixth degree of longitude. This would place the line from which the run could be made from the east all the way from twelve to fifty miles east of the land actually opened to settlement. In other words, persons desiring to make the run from the east would have to run across a strip of land from twelve to fifty miles wide before they would reach the edge of the land which was to be opened to settlement and entry. We cannot agree with this view of the law, because it will be presumed that the President did that which he had a lawful right to do, and it is questionable if he had the right to open up, even temporarily for the use of those who wished to make the run, a strip of land one hundred feet wide off of the east side of the Osage Indian reservation and deprive the Indians and their lessee of the occupancy thereof even for the twenty-eight days intervening between the proclamation and the date of opening, while he did have the undoubted right to open up a strip one hundred feet wide immediately within the outer lines of the land actually opened up to settlement. And this is what we think he did. These are the lands which he had in mind when he wrote the proclamation. He was not then trying to keep people out of the lands which the Government had not even treated for, but out of the lands which he was proclaiming should on a certain day be opened to settlement; and when he referred to "a strip one hundred feet wide from the exterior of the country known as the Cherokee Outlet," he evidently meant that country known as the Cherokee Outlet which was then being opened to settlement and this theory is strengthened by the language used in other portions of the proclamation. The President says:

60 "Now, therefore, I Grover Cleveland, President of the United States, by virtue of the power in me vested by the statutes hereinbefore mentioned, and by other the laws of the United States, and by several agreements, do hereby declare and make known that all the lands acquired from the Cherokee Nation of Indians, the Tonkawa tribe of Indians, and the Pawnee tribe of Indians, by the three several agreements aforesaid, will, at the hour of twelve o'clock noon (central standard time) on Saturday the sixteenth day of the month of September, A. D. eighteen hundred and ninety-three, and not before, be opened to settlement under the terms of and subject to all the conditions, limitations, reservations, and restrictions contained in said agreements, the statutes above specified, the laws of the United States applicable thereto and the conditions prescribed by this proclamation, saving and excepting lands described and

identified as follows, to wit: The lands set apart for the Osage and Kansas Indians (describing them); the lands set apart for the Confederate Otoe and Missouri tribes of Indians, (then describing the lands); and the lands set apart for the Ponca tribe of Indians, (then describing these lands)" and then the proclamation exempts certain other reservations and lands.

From this language it will be seen that the President excepted from this opening the Osage reservation, the Kansas reservation, the Otoe and Missouri reservation and the Ponca reservation, and then finally uses the language "said lands so to be opened as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following, to wit:

"A strip of land, one hundred feet in width around and immediately within the outer boundaries of the entire tract of country, to be opened to settlement under this proclamation, is hereby temporarily set apart for the following purposes and uses, etc."

This language expressly sets apart a strip within the outer boundaries of the entire tract of country *to be opened to settlement* under the proclamation; and although it continues with the expression "said strip, the inner boundary of which shall be one hundred feet from the exterior boundary of the country known as the Cherokee Outlet," it must be remembered that the Indian reservations had been excepted by the President before he reached this point in the instrument, leaving only the lands to be opened to settlement. But the President continues in the same paragraph, by saying: "Such occupancy shall not be regarded as trespass or in violation of this proclamation, or of the law under which it is made; nor shall any settlement rights be gained thereby." If this strip on the east was from twelve to fifty miles east of the lands to be opened to settlement why provide that such occupancy should not be regarded as trespass, and that no settlement rights should be gained thereby? In fact why do the absurd thing of granting persons the right to start into a race for a home fifty miles away, on the east of the land to be opened when such persons could make the race from either the north, south or west and start from the outer line of the land to be opened? The President must have known that no man would run from the east if he had to start from the east line of the Osage Indian reservation, and we assume that the President did not intend to give persons the right to do that which no sane person would do. The one-hundred-foot strip, was a strip of land one hundred feet wide around the land actually opened up to settlement. But counsel for appellant says if this be the construction to be placed upon the proclamation then persons could have gone into the country on the railroad right of way or on school land or upon allotments. We think not. In construing a law or proclamation we should always bear in mind the purpose of the law or instrument. These lands to be opened joined right up against lands owned and occupied by individuals, on every side except the east, and it was necessary to give the people a place all along the line from which they could have an equal start in the race; hence the one-hundred-foot strip. If the one-hundred-foot strip had not been set apart, those who in-

tended to make the race would have been compelled to start from the highway on the section lines which led into the country, and these were only four rods wide and are a mile apart, or they would have been compelled to pay license to make the race from the lands adjoining the lands to be opened, for which privilege in many cases a large sum of money would have been asked, thus giving a decided advantage to the rich; and the same thing might have been true of the Indian reservations. The hundred-foot strip gave all an
61 equal show. It is alleged, though that the defendant started from that part of the Outlet known as the Ponca reservation. From this allegation it will be seen that he was within the Ponca reservation before the hour of opening, and it is contended that the act of March 2nd, 1889, prohibited persons from entering upon and occupying any of the lands west of the ninety-sixth degree of longitude before the same was opened to settlement. This is true but the act of March 3rd, 1893, modified the act of March 2nd, 1889, to the extent that one who did not enter the lands opened to settlement in violation of the President's proclamation, and who was otherwise qualified could make entry. Congress and the President were dealing with the lands to be actually opened to settlement, and the fact that the defendant was within the Ponca Indian reservation prior to the time of opening did not disqualify him from making homestead entry on a tract within the country opened to settlement on September 16th, 1893.

For the reasons herein given the judgment of the lower court is hereby affirmed, at the cost of the appellant.

Concurring: Burford, C. J., Gillette and Beauchamp, JJ.

Not sitting: Hainer, J., who tried the case below, and Pancoast, J., who was of counsel.

Absent: Irwin, J.

62 And on the 18th day of July, 1902, there was filed in said supreme court a petition for appeal, which petition reads in words and figures, as follows, to wit:

63 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.
} Petition for Appeal.

The above-named plaintiff in error conceiving himself aggrieved by the judgment of the supreme court of the Territory of Oklahoma, rendered and delivered on the 15th day of July, 1902, affirming the judgment of the district court of Kay county in said Territory, sustaining the demurrer of the defendant in error to the petition of plaintiff in error, does hereby appeal from said order, judgment and decree, to the Supreme Court of the United States, for the reasons specified in the assignment of error, which is filed herewith, and made a part hereof, and he prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said judgment of affirmance was made, duly authenticated

by the clerk of this court, may be sent to the Supreme Court of the United States, and that the court may fix a supersedeas bond of the said appellant, to be given within a reasonable time, and enter all necessary orders herein allowing the foregoing appeal.

S. H. HARRIS AND
JOHN W. SHARTEL,
Att'ys for Plaintiff in Error.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Petition for appeal. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

64 And afterward, on the same day, July 18th, 1902, there *was* filed in said supreme court in said cause, an assignment of errors, and affidavit as to amount involved in controversy, which read in words and figures as follows, to wit:

65 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.

Assignment of Errors on Appeal.

Now, on this 18th day of July, A. D. 1902, comes the said plaintiff in error Robert L. Winebrenner, by S. H. Harris and John W. Shartel, his solicitors, and says, that the decree and judgment rendered in said cause on the 15th day of July, A. D. 1902, affirming the judgment of the district court of Kay county, is erroneous and against the justice and rights of said plaintiff in error, for the following reasons to wit:

First. That the said supreme court erred in affirming the judgment of the district court, and in not reversing the same as prayed for in the petition in error in said cause:

Second. That the said supreme court erred in not reversing the judgment of the said district court sustaining the demurrer to the amended petition of plaintiff in error, and in not remanding said cause to the said district court with direction to overrule said demurrer:

Third. That the said supreme court erred in not holding and deciding that the 2″ amended petition of plaintiff in error stated facts sufficient to require the cancellation of the patent of the defendant in error, to the land in question:

Fourth. That the said supreme court erred in holding and deciding that the defendant in error was not disqualified to hold and acquire title to the land in question by prior settlement thereon, by reason of his having entered upon said land immediately after twelve o'clock, noon, September 16th, 1893, from the Ponca
66 Indian reservation, in the country known as the Cherokee Outlet:

Fifth. That the said supreme court erred in not holding

and deciding that the defendant in error, Edward C. Forney, was, and is, disqualified to take and hold land in the Cherokee Outlet, and the land in question, by virtue of prior settlement, by reason of his having entered upon said land from the Ponca Indian reservation, and by reason of having been upon said Indian reservation, and within the country known as the Cherokee Outlet, prior to twelve o'clock, noon, September, 16th, 1893.

Wherefore, the said plaintiff in error prays, that the said decree, judgment and order of the said supreme court of Oklahoma Territory be reversed, and that the said court may be directed to enter a decree reversing the said cause, and remanding the same to the district court of the county of Kay, Territory of Oklahoma for further proceedings in accordance with law.

S. H. HARRIS AND
JNO. W. SHARTEL,
Att'ys for Plaintiff in Error.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Assignment of errors. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

67 TERRITORY OF OKLAHOMA, } ss:
Logan County, }

S. H. Harris being first duly sworn says, that he is well acquainted with the property in controversy in the foregoing case of Robert L. Winebrenner *vs.* Edward C. Forney, and with the value of said property, and the matter in controversy; and that there is more than five thousand ($5000) dollars involved in said litigation between the said parties, exclusive of costs, and that the land in question is now, and has at all times during this litigation, been worth more than the sum of five thousand ($5000) dollars.

S. H. HARRIS.

Subscribed and sworn to before me this July 18, 1902.
[SEAL.] BENJ. F. HEGLER,
Clerk Sup. Court.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Affidavit. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

68 And thereafter, on the same day, to wit, July 18th, 1902, there was filed in said supreme court in said cause, an order allowing appeal, which order reads in words and figures as follows, to wit:

69 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error. } Order.

Now on this 18th day of July, A. D. 1902, comes S. H. Harris and John W. Shartel, solicitors for the plaintiff in error in this cause,

and present to the court the application and petition of plaintiff in error for an appeal to the Supreme Court of the United States, from the judgment and decree rendered in this court on the 15th day of July, A. D. 1902, affirming the judgment of the district court of Kay county in this cause.

And plaintiff in error having filed with said application and petition for an appeal, his assignment of errors, and presented said application in open court, it is by the court ordered, that the said appeal to the Supreme Court of the United States, be, and the same is hereby granted, and the clerk of this court is hereby directed to certify a full, true and correct transcript of the record of this court, to the Supreme Court of the United States; and upon the further application of plaintiff in error, that the amount of the supersedeas bond be fixed to supersede the judgment of this court in the premises, and it being made to appear to this court, that the value of the property in controversy exceeds the sum of five thousand ($5000) dollars, exclusive of costs, and that this is a proper case of appeal to the Supreme Court of the United States, it is by the court ordered, that upon giving of an undertaking in the sum of 200.00 dollars, to be approved by the clerk, of this court within fifteen days from this date, the said appeal shall operate as a supersedeas, and the chief justice of this court is further directed to attest and sign the citation in said cause on such appeal.

JNO. H. BURFORD,
Chief Justice Supreme Court of Oklahoma Territory.

[Endorsed:] 1169. Winebrenner *vs.* Forney. Order allowing appeal. Filed July 18, 1902. Benj. F. Hegler, clerk sup. court.

70 And thereafter, to wit, on the 31st day of July, 1902, there was filed in said supreme court in said cause, a supersedeas bond, which reads in words and figures as follows, to wit:

71 In the Supreme Court of the Territory of Oklahoma.

ROBERT L. WINEBRENNER, Plaintiff in Error,
vs.
EDWARD C. FORNEY, Defendant in Error.

Undertaking on Appeal.

Know all men by these presents, that we, Robert L. Winebrenner as principal, and Park Bridges and W. H. Poffenberger as sureties, are held and firmly bound unto the defendant in error, Edward C. Forney in the full and just sum of two hundred ($200) dollars to be paid to the said Edward C. Fornwy, his certain attorneys, executors, administrators, or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Witness our hands this twenty-ninth day of July, in the year of our Lord, one thousand nine hundred and two.

Whereas, lately at a session of the supreme court of the Territory

of Oklahoma, in a suit pending in said court, wherein Robert L. Winebrenner was plaintiff in error, and Edward C. Forney was defendant in error, in which court and cause, a judgment and decree was rendered on the 15th day of July, in the year of our Lord, one thousand nine hundred and two, adverse to the interest of said plaintiff in error, and affirming the judgment of the district court of Kay county in favor of defendant in error, and against the plaintiff in error, and the said Robert L. Winebrenner having, on the 17th day of July, in the year of our Lord, one thousand nine hundred and two, appealed from said judgment and decree to the Supreme Court of the United States, and having filed the said appeal in the office of the clerk of said court to reverse the said judgment in the aforesaid suit, and procured citation to issue to the said Edward C. Forney,
72 citing and admonishing him to be, and appear at a session of the Supreme Court of the United States to be holden at the city of Washington, on the 16th day of August, next: Now, the condition of the above obligation is such, that if the said Robert L. Winebrenner shall prosecute said appeal to effect, and answer all damages and costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

ROBERT L. WINEBRENNER.
PARK BRIDGES.
W. H. POFFENBERGER.

The foregoing undertaking accepted, and sureties approved by me, this 31st day of July, A. D. 1902.

BENJ. F. HEGLER,
[SEAL.] *Clerk of Supreme Court.*

73 *Valuation of Sureties.*

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

Park Bridges being first duly sworn, says that he is surety on the above and foregoing undertaking, and that he is worth the sum of four hundred dollars, over and above all his debts, liabilities and exemptions.

PARK BRIDGES.

Subscribed and sworn to before me this 29 day of July, 1902.

E. E. CASS,
[SEAL.] *Notary Public.*

My commission expires 6" day of July, 1903.

TERRITORY OF OKLAHOMA, } ss:
Kay County, }

W. H. Poffenberger being first duly sworn, says that he is surety on the above and f-regoing undertaking, and that he is worth the sum

of four hundred dollars, over and above all his debts, liabilities and exemptions.

W. H. POFFENBERGER.

Subscribed and sworn to before me this 29 day of July, 1902.

E. E. CASS,
Notary Public.

[SEAL.]

My commission expires on the 6" day of July, 1903.

74 TERRITORY OF OKLAHOMA, } ss:
Kay County, }

—— —— being first duly sworn, says that he is surety on the above and foregoing undertaking, and that he is worth the sum of — dollars, over and above all his debts, liabilities and exemptions.

—— ——.

Subscribed and sworn to before me this — day of ——, 1902.

—— ——.
Notary Public.

My commission expires on the — day of ——, 190–.

TERRITORY OF OKLAHOMA, } ss:
Kay County. }

—— —— being first duly sworn, says that he is surety on the above and foregoing undertaking, and that he is worth the sum of — dollars, over and above all his debts, liabilities, and exemptions.

—— ——.

Subscribed and sworn to before me this — day of ——, 1902.

—— ——,
Notary Public.

My commission expies on the — day of ——, 190–.

Endorsed on the back as follows, to wit: 1169—Winebrenner *vs.* Forney—Appeal bond—Filed July 31, 1902. Benj. F. Hegler, clerk supreme court.

75 Supreme Court of Oklahoma Territory.

I, Benj. F. Hegler, clerk of the supreme court of the Territory of Oklahoma, do hereby certify that the foregoing 74 pages, numbered from 1 to 74 inclusive, are a true and complete transcript of the record and all proceedings in said supreme court in the cause of Robert L. Winebrenner, plaintiff in error, *vs.* Edward C. Forney, defendant in error, as the same remain upon the files and record of said supreme court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said supreme court, at the city of Guthrie, this 31st day of July, A. D. 1902.

[Seal Supreme Court, Territory of Oklahoma.]

BENJ. F. HEGLER,
Clerk of the Supreme Court of the Territory of Oklahoma.

Endorsed on cover: File No. 18,637. Territory of Oklahoma supreme court. Term No. 409. Robert L. Winebrenner, appellant, *vs.* Edward C. Forney. Filed August 4", 1902.